IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, PETITIONER.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, PLAINTIFF IN ERROR, vs. TINE COHEN, DEFENDANT IN ERROR.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES.

The PETITION of the MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, respectfully shows to this Honorable Court as follows :

I.

That your petitioner is a mutual life insurance company, created and chartered under and by virtue of an Act of the Legislature of the State of New York, of April 12th 1842, entitled: "An act to incorporate The Mutual Life Insurance Company of New York," and a citizen of said State, with its principal office in the City of New York.

That in the year 1892 the Legislature of the State of New York, enacted a general statute (Laws 1892, Chap. 690), as follows:

"Sec. 92. No Forfeiture of Policy Without Notice. No life insurance corporation doing business in this State shall declare forfeited or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage paid by the corporation or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation,

or to a duly appointed agent or person authorized to collect such premium by or before the day when it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given."

If this New York statute governed this policy at all, *which we deny*, then the above act of 1892 governed the premium due dates from December 10, 1892, to December 10, 1896, during which period no premiums were paid.

In 1897 the above act of 1892 was amended as follows:

CHAP. 218.

Became a law April 8, 1897, with the approval of the Governor. Passed, three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * * * *

"SEC. 92.—NO FORFEITURE OF POLICY WITHOUT NOTICE.—No life insurance corporation doing business in this State shall within one year after the default in pay-

ment of any premium, installment or interest declare forfeited or lapsed,—any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term of insurance contract for year or less, nor shall any such policy be forfeited, or lapsed by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been dnly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or

lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.

SEC. This act shall take effect immediately."

If this New York statute governs the policy at all, *which we deny*, then the above act of 1897, governed the premium due dated June 10, 1897, when no premium was paid. Cohen died September 21st, 1897, and suit was not begun until November, 1898, more than *seventeen* months after the default in June, 1897.

II.

Your petitioner states that shortly prior to June 10th, 1885, one Alexander Cohen, of Butte, Montana, made application in writing to your petitioner, for insurance upon his life in the sum of Three Thousand Dollars, and his application contained the following provision :

" This application is submitted to the said company with the following express covenants and agreements :

" 1. That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said company and the first premium thereon actually paid du-

ring the continuance of the life proposed for insurance in the same condition of health as described in the application."

In pursuance to this application a policy was issued and delivered to the insured at Butte, Montana.

The following, excepting provisions of the contract not affecting this case, is substantially a copy of the policy :

" In consideration of the application for this policy, and of the truth of the several statements made therein, and of the premiums hereinafter specified, promises to pay, at its home office in the City of New York, unto Alexander Cohen, of Butte City, in the County of Silver Bow, State of Montana, fifteen hundred dollars, on the tenth day of June, in the year 1905, if then living, at its said office of the company in the City of New York, or if he should die before that time, then in like manner to pay the sum of three thousand dollars to his wife, Tine Cohen, if living, and if not living, then to their children, their executors, administrators or assigns (any indebtedness to the company on account of this contract to be first deducted therefrom), within sixty days after satisfactory proof at its said office of the death of said Alexander Cohen during the continuance of this policy, upon the following conditions :

" First. The ——— annual premium of eighty-nine dollars and sixty-one cents shall be paid in advance to the company, at its home office in the City of New York, on the delivery of this policy, and thereafter on the tenth day of June in every year during the continuance of this contract.

" Second. The insured shall not transgress the limits of residence and travel prescribed on the back of this policy, which are hereby referred to and made part hereof, or engage in any occupation there forbidden, without the consent of the company in writing.

"Third. The company does not insure against self-destruction in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the insured.

"Fourth. If this policy shall become void, all payments previously made upon it shall be forfeited to the company; but, if such forfeiture shall occur by nonpayment of premium, after three full annual premiums have been pain, the company will, upon surrender of this policy, within six months after such forfeiture, issue a paid-up policy for a fixed sum computed according to the legal standard of the State of New York.

"Fifth. Proofs shall be furnished to the company as soon as possible after the death of the insured in such form and containing such statements as the company shall require under its general rules.

"Sixth. Any claim under this policy shall be presented in writing to the company, at its home office, in the City of New York, accompanied by a statement of the Court in which the same is to be prosecuted if not settled, at least sixty days before any action shall be commenced thereon, to the end that the same may be settled amicable. And, in case such claim should arise after the death of the insured, any action thereon shall be commenced in one year thereafter.

"In witness whereof the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the City of New York, the tenth day of June, A. D., one thousand and eighty-five.

"ROBT. A. GRANNISS, Vice President.

"ISAAC S. LLOYD, Secretary.

* * * * * * * *

"NOTICE.

"Payment of Premiums: All premiums are due and payable at the home office of the company in the City of New York; but will be accepted elsewhere, when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived;"

Premiums were paid on the policy to the 11th day of June, 1892, when the semi-annual premium for the half year beginning on that date was paid. All subsequent premiums remained unpaid when said Alexander Cohen died September 21, 1897, at Rossland in British Columbia.

III.

Your petitioner further states that after the death of the said Alexander Cohen and *on the 9th of November, 1898*, Tine Cohen, the wife of deceased, the beneficiary in the policy, began an action against your petitioner to recover Three Thousand Dollars, the amount of the policy, with interest, in the United States Circuit Court for the District of Washington, Western Division, in her complaint setting forth the policy and alleging compliance with its terms on the part of the insured during his life time, and on her part subsequently.

Your petitioner in its answer admitted the execution and delivery of the policy, but denied it was delivered or entered into the City of New York, and controverted compliance with the terms of the policy on the part of the insured or defendant in error, and asserted as a defense that

the application for the policy, which by its terms constituted a part of said policy, contained the following express agreement:

"1. That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said company and the first premium thereon actually paid during the continuance of the life proposed for insurance in the same condition of health as described in the application."

And further alleged that the policy, which was the same in the complaint set forth, contained the following provision:

"NOTICE.—Payment of Premiums: All premiums are due and payable at the home office of the company in the City of New York; but will be accepted elsewhere, when duly made in exchange for the company's receipt, signed by the President or Secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

And further alleged that there was printed upon, and constituted a part of the policy, the following:

"Third. No policy holder must expect to be notified when his premium will be due. It is the practice of the company to send these notices as reminders, when the address is known, but no responsibility is assumed on the part of the company in consequence of their non-reception."

And further alleged that the said Alexander Cohen paid the premiums due on said policy up to the 10th day of June, 1892, and on the 11th day of said month made

payment of the semi-annual premium for the ensuing half year beginning on said day, but thereafter wholly neglected, failed and refused to pay any other or further premium, or part of a premium upon said policy, and that no payment whatever was made by or on behalf of the said Alexander Cohen of any annual or semi-annual premium due on said policy thereafter, but that the same was suffered to lapse and become forfeited; and by reason of said defaults the said policy did become forfeited, lapsed and void, and was so declared by your petitioner.

Your petitioner further states that a demurrer having been filed to its said answer, the same was sustained by the said Circuit Court, and your petitioner, electing to stand upon its answer, judgment was entered against it for $2,671.41, with interest and costs, but your petitioner feeling aggrieved by the judgment of said Circuit Court, applied to the Circuit Court of Appeals for the Ninth Circuit for a writ of error for the correction of the manifest errors that had happened, to the damage of your petitioner as shown by the records and proceedings, as well as in the judgment of said cause, and a writ of error was issued out of said Circuit Court of Appeals, and upon the return of said writ the said cause was argued before the said Circuit Court of Appeals, and thereafter and on the 2d day of October, 1899, the said Circuit Court of Appeals affirmed the judgment of the said Circuit Court.

IV.

Your petitioner states that upon the face of the record of said cause, as the same is on file and as presented in said Circuit Court of Appeals, and by the assignment of error made and presented by your petitioner in the Circuit Court of Appeals, the following questions were and are in issue and involved in the adjudication of said case:

FIRST.

Whether the contract of insurance upon which the action was brought was a contract entered into and governed by the laws of Montana or the laws of New York, and whether the statute of the State of New York of 1892 and 1897 requiring notice to be given, applies to this case or at all in the States of Montana or Washington.

SECOND.

Whether actual notice on the part of the insured obviated the necessity of the statutory notice, the insured not being a resident of the State of New York.

THIRD.

Whether the parties were competent to agree, in a policy of insurance delivered and taking effect in the State of Montana, that no other notice than that contained in the policy of the due date of premium should be given or required.

FOURTH.

Whether your petitioner, being a corporation created and chartered under a special act of the Legislature of New York, was intended to be included in or affected by the said general acts of 1892 and 1897.

FIFTH.

Whether even if the Statute of 1892 applied at all it

did not apply only to the premiums due respectively June 11th, 1893, 1894, 1895 and 1896, and whether the Statute of 1897 did not apply to the premium due June 11th, 1897, and whether if the Statute of 1897 applied to the premium due June 11th, 1897, there was no obligation to send any notice because Cohen was not a resident of the State of New York.

SIXTH.

Whether, in event the statute of New York should be held to apply to this case, an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

SEVENTH.

Whether defendant in error can plead as her cause of action the policy of insurance and performance of its terms and conditions upon the part of the insured, and after having admitted non-payment of the premiums, recover because your petitioner failed to allege the termination of the contract by giving the notice prescribed by the statute of New York.

EIGHTH.

Whether such recovery does not constitute a fatal departure from law to law.

NINTH.

Whether defendant in error, in order to avail herself

of the New York statute, would not have been required to bring her action within one year after default was made in the payment of premium as provided in the amendment of April, 1897, of the New York statutes, the action having been commenced on the 9th day of November, 1898, more than one year from June 11, 1897, the last premium due date before death.

TENTH.

Whether under the charter of the defendant company and the Statutes of the State of Montana or Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the company.

V.

Your petitioner states that it has issued and now outstanding in the different Territories and States of the Union many thousands of life insurance policies, and has entered into such contracts with large numbers of the residents and citizens of the State of Washington, and other life insurance corporations, created and organized under the laws of the State of New York, have entered into and now have outstanding large numbers of similar policies in such States and Territories. That at the time of rendering its opinion in this case the Honorable Circuit Court of Appeals rendered similar opinions and upon substantially the same questions in three other cases wherein your petitioner is plaintiff in error and that another case in which your petitioner is plaintiff in error has been submitted to the said Circuit Court of Appeals, involving the same questions, and a number of similar cases are now

pending for decision in the United States Circuit Court for the District of Washington. That in view of the large amount of money involved in said cases, and in view of the difference in judicial opinions respecting a number of the questions involved in the cases, your petitioner represents that the gravity of the matters in this case is such that they should be authoritatively and finally adjudicated by this Honorable Court, upon a full and fair presentation of the merits of the case (or so much of them as the Court may direct) on the part of your petitioner and the said defendant in error, Tine Cohen. The Phinney case (No. 12) in this Court involves kindred statutes.

VI.

Your petitioner states that a certified copy of the entire record in said case in the said Circuit Court of Appeals is herewith furnished and hereto annexed as a part of this application, in conformity to Rule 37 of this Honorable Court relating to cases in the Circuit Court of Appeals, and the same is marked "Exhibit A."

WHEREFORE, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, certifying the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in said cause therein entitled "The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, *vs.* Tine Cohen, defendant in error, No. 539," to the end that the said cause may be reviewed and determined by this Court as provided by Section 6 of an Act of Congress, entitled: "An Act to Establish Courts of Appeals

and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States and for Other Purposes," approved March 3, 1891, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity to said act, and that the said judgment of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court;

And your petitioner will ever pray.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
ROBERT C. STRUDWICK,
Attorneys and Counsel for Petitioner.

SOUTHERN DISTRICT OF NEW YORK, } ss.
COUNTY OF NEW YORK. }

EDWARD LYMAN SHORT, being duly sworn, says: That he is one of the attorneys and of counsel for The Mutual Life Insurance Company of New York, the Petitioner above named, and as such has had personal charge for it of the case in the foregoing petition named in the Circuit Court of Appeals for the Ninth Circuit. That he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

EDWARD LYMAN SHORT.

Subscribed and sworn to before me this 18th day of November, A. D., 1899.

ALFRED MACKAY,
(SEAL.) Notary Public,
New York Co.